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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 62

FEDERAL TRADE COMMISSION, PETITIONER

v.

COLGATE-PALMOLIVE COMPANY AND TED BATES & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The first opinion of the court of appeals (R. 34–43) is reported at 310 F. 2d 89. The second opinion of the court of appeals (R. 130–140) is reported at 326 F. 2d 517. The first opinion of the Federal Trade Commission (R. 9–32) is reported at 59 F.T.C. 1452. The second and third opinions of the Commission (R. 47–60, 96–98) are not yet reported.

JURISDICTION

The judgment of the court of appeals (R. 140) was entered on December 17, 1963. On March 19, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including

April 15, 1964. The petition was filed on April 15, 1964, and granted on May 25, 1964 (R. 142; 377 U.S. 942). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission may prohibit, as an unfair or deceptive trade practice, the representation that a test, experiment, or similar demonstration shown on television provides the viewer with visual proof of a product claim when the observed test is in truth a sham because of the undisclosed use of substitutes.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The Commission's complaint charged respondents (an advertiser and its advertising agency) with having committed false and deceptive acts and practices, in violation of Section 5 of the Federal Trade Com-

mission Act, in connection with three 60-second television commercials for Rapid Shave shaving cream, which were widely broadcast on a national network in 1959 (R. 9). The advertisements are set forth in detail in the Commission's first opinion (R. 9–11). They were summarized by the court of appeals as follows (R. 35):

> The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturizing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass.

On appeal from the hearing examiner's initial decision dismissing the complaint, the Commission, in an opinion by Commissioner Elman, concluded (1) that Rapid Shave could not shave sandpaper under the conditions depicted in the demonstration, and that respondents had therefore misrepresented the product's moisturizing qualities (R. 14–18); and (2) that, quite apart from that misrepresentation, the representation that a bona fide experimental proof was being shown (when the experiment was in fact rigged by the use of a plexiglass substitute) was itself both false and material and was therefore unlawful. "The point is that the 'proof' offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and, in fact, the 'proof' was not proof at all" (R. 21). Accord-

ingly, the Commission entered an order both (1) forbidding respondents to misrepresent the quality or merits of Rapid Shave or any other shaving cream, and (2) forbidding them, "in describing, explaining, or purporting to prove the quality or merits of any product," to misrepresent "that pictures, depictions, or demonstrations * * * are genuine or accurate representations * * * of, or prove the quality or merits of" the product (R. 7–8).

On review, the Court of Appeals for the First Circuit, in an opinion by Judge Aldrich, set aside the Commission's order (R. 34–43). While fully sustaining the Commission's conclusion that respondents had misrepresented the qualities of Rapid Shave (R. 35–38), the court held that the Commission's order forbidding the undisclosed use of mock-ups in television commercials was too broad. It remanded the case for the Commission to draw a new order.

On remand, the Commission undertook to reconsider the entire case and to formulate a new order responsive to the questions raised by the court of appeals. In its opinion on remand, the Commission restated its theory underlying the "demonstration" aspect of the case (R. 49):

> Respondents, in their television commercials for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of

> the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper."

The Commission also explained that it was not forbidding the use of all mock-ups in television advertising (R. 51):

> The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to

> the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product.

The final order entered by the Commission on remand (after the Commission in a third opinion again reexamined the scope and application of the order, R. 96–98) ordered the respondents to cease and desist from (R. 93–94):

> Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sales, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.[1]

[1] The order affords respondent Ted Bates & Company, the advertising agency, a defense in the situation where it neither knows nor has reason to know that a mock-up was used in the test (R. 94). The order also forbids misrepresentations of product quality or merits. This latter part of the order was sustained by the court below and is therefore not in issue before this Court.

Respondents again sought review of the order, contending primarily that the Commission had not complied with the court's earlier mandate. The court did not accept or reject either this contention or the Commission's contrary arguments.[2] Because of the importance of the substantive issue, the court declined to review the Commission's last order "from the limited standpoint of whether it comports with our previous opinion." Instead, it expressly undertook to reexamine the Commission's position "on the merits" (R. 133).

The court again set aside the order, remanding the case with directions to "enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished" (R. 139). Noting that the use of mock-ups or substitutes is at times necessary to compensate for the limitations of television and that the Commission did not object to this use in contexts where there is no representation that experimental proof is being furnished, the court found "great difficulty in determining any dividing line between what is and what is not a test or experiment" (R. 135). In light of this and the slight harm it felt resulted where, although the purchaser is deceived in believing he is seeing an experimental proof, the product he "buys can do and has done exactly what he thinks he sees it do" (R. 136), the court held that there was "only one practical solution." That was to permit representations that "experimental proof" is being furnished wherever the

[2] See, in particular, the Commission's third opinion which dealt with this question (R. 96–98).

sponsor neither falsifies the qualities of the advertised product nor states expressly that the experiment or test is being performed without the use of mock-ups (R. 138).

INTRODUCTION AND SUMMARY OF ARGUMENT

As a result of the extended proceedings in this case, the issues have been narrowed to one: Whether under Section 5 of the Federal Trade Commission Act the Commission is authorized to prevent the use on television of advertising demontrations that purport to furnish visual experimental proof of a product's quality or merits but in fact prove nothing because of the undisclosed substitution of a mock-up or other sham product. We believe that the resolution of this issue involves no more than the application of settled principles of the law of deceptive practices to the new advertising techniques which television has developed to take advantage of its capabilities as a "live" medium. To the extent that respondents misrepresented the qualities of their product—*i.e.*, the claim that Rapid-Shave will shave sandpaper when in fact it will not—the case involved only the application of those principles to a traditional misrepresentation. The additional problem created by television advertising is the danger of a different kind of misrepresentation—not merely a false claim as to a product's capabilities, but the further false claim that these capabilities are being proven to the viewer by a test which the viewer is watching.

Under established rules this misrepresentation, too, is plainly an unfair or deceptive trade practice: (1)

it involves a deliberately false representation; and (2) the representation is material in the sense that it furnishes an important inducement to the buyer. Indeed, as the Commission pointed out, the very purpose of purporting to furnish experimental proof, rather than merely stating the sponsor's claims, is to convince skeptical television viewers that they have something more than the sponsor's say-so on which to base their purchasing decisions. The fact that a seller's factual representations are false and material in the sense of being calculated to induce sales has always been deemed sufficient to make applicable the statute's prohibitions of unfair and deceptive trade practices. No further showing of injury to either the public or competing sellers is required. Purchasers are entitled to be protected against being tricked into making a purchase, whether or not the false inducement results in the buyer's receiving a product with which he would be dissatisfied or paying more for it. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112. Honest competitors cannot be put to the choice of offering false inducements or losing sales, for the "Commission was not organized to drag the standards [of fair dealing] down." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79.

Finally, even if it were necessary to look beyond the general statutory prohibition of all material misrepresentations, the Commission's action in this case was plainly authorized and warranted. The Commission properly concluded that the substantial public harm resulting from false representations that experimen-

tal proof is being furnished television viewers outweighs any possible "benefits" resulting from these misrepresentations. Its order is clear and does not interfere with the right of sponsors to use mock-ups to compensate for the limitations of television in portraying the qualities or uses of their products, so long as they do not add an additional representation that their claims can be confirmed and verified by watching a televised test or experiment which is in fact rigged by the undisclosed substitution of mock-ups. The Commission's order should therefore have been sustained by the court of appeals.

ARGUMENT

I

RESPONDENTS' REPRESENTATION THAT THE TELEVISED "SANDPAPER TEST" WAS A BONA FIDE EXPERIMENT FURNISHING VISUAL PROOF OF A QUALITY OF RAPID SHAVE WAS FALSE AND A MATERIAL INDUCEMENT TO PURCHASERS; IT WAS THEREFORE AN UNFAIR OR DECEPTIVE TRADE PRACTICE

A. THE REPRESENTATION WAS FALSE AND MATERIAL

The only facts necessary to establish an unfair or deceptive trade practice have been found by the Commission: the use of factual representations that were false and would furnish material inducements to purchasers. None of the Commission's findings has been overturned by the court below.

First, respondents represented that they were actually showing television viewers an experimental test (the "sandpaper test") to prove that Rapid Shave is as "moisturizing" as claimed. Viewers were in-

tentially led to believe that they were seeing visual proof of the respondents' claims in the form of a test involving the application of shaving cream to sandpaper and the shaving of sandpaper. The respondents have never challenged the Commission's finding that this was the content of their representations on television, and the court below accepted this finding (R. 35).

Second, the representation was concededly false. Respondents were not showing an actual test or proof of the capacity of Rapid Shave. What was represented as a test was rigged by the use of a plexiglass substitute for sandpaper and thus could prove nothing as to the claimed effects of Rapid Shave on sandpaper.

Third, the Commission found that the sham "sandpaper test" was intended and calculated to convince otherwise skeptical viewers of the merits of Rapid Shave and to persuade them to buy the product—*i.e.*, it was intended to furnish a material inducement to purchasers. That finding has never been questioned and indeed could not be. The very purpose of the "sandpaper test" was to hold out something beyond the sponsor's say-so as proof of the truth of the sponsor's claims, because, it was felt, this "proof" would influence the purchasing decisions of viewers. As the Commission's first opinion states (R. 21):

> [T]he pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove Rapid

> S h a v e's super-moisturizing p o w e r * * *." Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the difference in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell."

The Commission's findings that respondents intentionally misrepresented facts that they believed, and intended, would influence the purchasing decisions of viewers are, thus, not seriously open to challenge. Respondents have argued that, where such misrepresentations are the means of making a true claim about the product, they are not "material," because the purchaser is not significantly harmed by the deception. He is initially misled, perhaps, but eventually he receives a product which has the qualities he expected. But this is a mere play on the word "material." Respondents' misrepresentations were "material" in the only sense in which this term has been used in the law of unfair or deceptive trade practices: they were intended and calculated to influence purchasers in making their purchasing decisions.

B. THE FEDERAL TRADE COMMISSION ACT FORBIDS ANY FALSE STATEMENT WHICH IS INTENDED AND CALCULATED TO INFLUENCE AND MISLEAD PURCHASERS

Section 5 of the Federal Trade Commission Act proscribes, as an unfair and deceptive trade practice, the intentional misrepresentation of *any* fact which would constitute a material factor in a purchaser's decision to buy a product. As a matter of statutory policy, there is no basis for limiting the generality of this rule. The Act is intended to protect the rights of purchasers and honest competitors by requiring compliance with appropriate standards of fair dealing. Purchasers are granted a statutory right to exercise their preferences in a context free of any deception intended or likely to influence their decisions. This simply recognizes an accepted standard of fair dealing: purchasers should not be tricked into buying any product. Honest competitors require the same protection. They cannot fairly be required to choose between losing sales and misrepresenting facts important to a purchaser's decision. "The Commission was not organized to drag the standards [of fair dealing] down." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79.

As a matter of precedent, we know of no exceptions to the rule prohibiting misrepresentations intended to influence and deceive buyers in making their purchasing decisions. Indeed, the history of judicial interpretation of the Act can fairly be described as a record of rejection of proposed exceptions based on the alleged harmlessness of deceiving purchasers in particular respects. This Court early rejected the defense that, while the buyer was materially misled as to the precise

qualities of the product, he received a product every bit as good as the one he was led to expect. "[T]he public is entitled to get what it chooses," regardless of the wisdom or folly of the grounds for its preferences. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78. Similarly, in a series of cases the courts have rejected defenses based on the fact that the misrepresentations, while material to purchasers, related only to extrinsic factors, not to the qualities of the product itself.[3] For example, a seller cannot appeal to the purchaser's pride by stating falsely that his offer is being made only to a few carefully selected persons, although the buyer will receive the very product he expected and will pay no more for it than he planned to pay. *Federal Trade Commission* v. *Standard Education Society*, 86 F. 2d 692 (C.A. 2), modified, 302 U.S. 112. And this Court has held that a purchaser is entitled to be protected against being duped into buying an encyclopedia when he thinks he is being given the encyclopedia and sold an accompanying "extension service," even though he receives exactly what he believed he would receive and pays

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[3] See *e.g.*, *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7) (failure to disclose country of origin of product); *Federal Trade Commission* v. *Standard Education Society*, 86 F. 2d 692 (C.A. 2) (dishonest testimonials), modified, 302 U.S. 112; *Mohawk Refining Corp.* v. *Federal Trade Commission*, 263 F. 2d 818 (C.A. 3) (that product is reprocessed); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (seller's trade status); *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 187 F. 2d 693 (C.A. 7) (false disparagement of competitors).

exactly what he thought he would pay.[4] *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112. Such "extrinsic" but material misrepresentations are condemned for reasons best stated by Judge Learned Hand—they "give a competitive advantage to the less scrupulous seller and * * * they not only add nothing to the buyer's opportunities to buy wisely, but hold out to him false inducements." *Federal Trade Commission* v. *Standard Education Society, supra*, 86 F. 2d at 696.

These principles are dispositive of the present case. One of the factors material to purchasers is the basis they have for believing the truth of a seller's claims. Accepted standards of fair dealing would not permit a seller to state falsely that he was a minister or a judge or a relative of the buyer and could therefore be trusted as to the truth of his claims. Regardless of the truth or falsity of the claims made for the product, such deception in the means of convincing buyers of the truth of the claims is unfair both to purchasers and to honest competitors. Similarly, the Act would prohibit a false representation that the X testing agency had certified the capacity of Rapid Shave to make sandpaper shaveable, regardless of the actual capabilities of the product. A buyer who relied on the representation would be significantly deceived in the exercise of his preferences; a competitor unwill-

[4] Similarly, the Commission can doubtless forbid an appeal to the purchaser's charity or sympathy based on the false representation that a particular seller contributes one-half his earnings to charity (or is impoverished) and should therefore be favored.

ing to resort to significant deception would be unfairly disadvantaged.

Identical reasons condemn a rigged experimental "proof" intended to convince skeptical television viewers of the truth of a sponsor's claims. Buyers should not be tricked into buying a particular product; competitors cannot be required to choose between presenting sham tests as proof of their own claims and losing sales. For these reasons the Commission's power to forbid sham experiments represented as proof of product claims does not depend upon a showing that the underlying product claims are untrue. The dishonesty of this method of convincing purchasers to accept the seller's word, without more, justified the Commission in finding it to be an unfair method of competition.

II

THE COMMISSION ACTED WITHIN ITS AUTHORITY IN FORBIDDING FALSE REPRESENTATIONS THAT A SPONSOR IS FURNISHING VISUAL, EXPERIMENTAL PROOF OF A PRODUCT CLAIM

We believe that the Federal Trade Commission Act forbids any misrepresentation intended to influence the decisions of purchasers, without any further showing of harm. But, even if the respondents were correct in arguing that not all material misrepresentations are prohibited, the Commission's order in the present case should have been affirmed; for the Commission could and did reasonably conclude that the harm of such misrepresentations as are involved in this case far exceeds any possible benefits or convenience to advertisers from permitting their use.

The court of appeals held that the Commission could not apply the general prohibition of material misrepresentations to sham tests purporting to prove a product claim. It believed that the harms are slight when a sponsor represents that a rigged experiment gives visual proof of the merits of a product, so long as the product in fact has the merits claimed for it. The court considered these harms outweighed by the difficulties of forbidding such misrepresentations without also interfering with a sponsor's occasional need to use substitutes and mock-ups to give an accurate picture of the merits of his product. While we believe that the court's assessment of the balance of harms and needs is demonstrably wrong, the heart of the issue lies elsewhere. If material misrepresentations are ever to be tolerated for reasons such as those given by the court below, it is for the Commission, not the reviewing court, to make this determination, subject only to review for abuse of the agency's discretion. *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643; *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304; *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112. In this case the Commission properly exercised its discretion in declining to approve respondents' misrepresentations.

A. The Commission was amply justified in concluding that the harms of rigged experimental proofs outweigh the need for them. The legitimate needs of sponsors are not affected by the order. When a sponsor does not purport to be furnishing experimental proof to verify his claims about the product,

no material deception may result from the use of substitutes to compensate for photographic deficiencies in the portrayal of his product or its uses. For this reason the Commission's order does not reach the use of substitutes in the great majority of television commercials: those which merely state and portray a product claim. The public will be significantly misled, however, when the sponsor attempts to influence the purchasing decisions of viewers by purporting to furnish visual proof of facts that confirm his claims and add credibility to his otherwise unverified words. The Commission's order was carefully drawn so as to apply only to deception in the presentation of "a test, experiment or demonstration[5] that * * * is represented to the public as actual proof of a claim made for the product" (R. 133).

So limited, the order does not interfere with any legitimate need of sponsors. The limitations of television may justify the undisclosed use of substitutes merely to portray a sponsor's product or illustrate its use, but no legitimate needs of sponsors justify the harm done by false representations that a sponsor is furnishing experimental proof of a product characteristic. It is, of course, true that the technical limitations of television may prevent a sponsor from showing on television an experiment which it can perform and has performed elsewhere. But if the sponsor

[5] As the court below noted, the Commission has indicated that the word "demonstration" is "to be read by the rule of *ejusdem generis*" to mean "demonstration 'in the nature of a test or experiment'" (R. 134).

cannot prove its claim experimentally on television, it may still report and illustrate the tests it has performed elsewhere, so long as it lets the viewer know the truth—that he has only the sponsor's word and not visual proof to justify his belief in the sponsor's claim.

On the other hand, the harms of sham "proofs" are great. At a minimum, like false statements that an offer is being made only to selected persons, they "give a competitive advantage to the less scrupulous seller and * * * not only add nothing to the buyer's opportunities to buy wisely, but hold out to him false inducements." *Federal Trade Commission* v. *Standard Education Society, supra,* 86 F. 2d at 696. But the harms go far beyond those involved in the *Standard Education* case.

One way in which television's quality as a "live" medium has revolutionized advertising is by enabling the advertiser not merely to assert the merits of his product, but to provide "see for yourself" proof by tests, experiments, and other demonstrations. The importance of such proof to truthful advertising is obvious. Because many sponsors will exaggerate the merits of their product, many television viewers are unimpressed with a mere claim as to a product's capabilities. For example, skeptical viewers will take "with a grain of salt" a sponsor's claim that his shaving cream can enable one to shave sandpaper, because the claim may well exaggerate—if it states at all—such subtle but highly important facts as what grade of sandpaper is used, how long it must soak, and how

hard one must press to shave it. A sponsor can reach these skeptical viewers if he can show an experimental proof of his claim. For such proof both shows the viewer exactly what is claimed for the product and, at the same time, allays any fear of exaggeration by offering an additional specific representation that the viewer is seeing these capabilities for himself.

The revolutionary capability of television—the capacity to demonstrate the truth of a claim to prospective buyers—is nullified by the decision below. If sham tests are permissible, there is no means by which the sellers of a superior product can convince skeptical purchasers of the truthfulness of their claims by furnishing visual, experimental proof to confirm their say-so. For the viewer will not be able to distinguish the real experimental proof from the rigged test and therefore will not be able to rely on any televised "demonstration" of superiority. The resulting loss will fall as heavily upon purchasers who want the certainty of visual proof as upon those sellers who in fact have a superior product and can prove it on television by an honest experiment. Both are entitled to be protected in their right to use this avenue of trustworthy communication made possible by television; and enjoyment of this right requires the prohibition of rigged experiments and tests which are falsely represented as proof of product claims.*

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* Respondents have argued that a prohibition of rigged experiments discriminates unfairly against those sellers of a superior product who cannot prove their claims because of the

There are additional harms as well. Because purchasers presumably will pay more for a product if they believe its characteristics have been verified before their eyes by a televised experiment, a fake experiment causes them to pay for something they do not receive—objective confirmation of the sponsor's claims. Similarly, the increased certainty and confidence that comes with visual "proof" of a sponsor's claims is likely to induce purchasers to buy a product which they believe has been "tested" before their eyes on television rather than another which, were it not for the misrepresentation of "proof," they would have preferred.

B. The court below rested its decision in large part upon the problems of compliance, administration, and enforcement that it anticipated would be caused by the difficulties of distinguishing the prohibited misrepresentations of visual, experimental tests from the permitted uses of mock-ups or substitutes in other television commercials. But here, too, the judgment of the agency charged with administering the statute should have been accepted unless it is manifestly wrong; and here, too, the Commission's judgment was more than justified. We believe that the crucial terms of the order—experiment, test, or similar demonstration purporting to furnish visual proof of a product characteristic—are as specific as possible

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technical limitations of television. But neither these sellers nor those who can in fact prove their claims on television will enjoy the benefits of convincing skeptical viewers if the viewer knows that what purports to be an experimental proof need be nothing more than a dramatic portrayal of a sponsor's claim for his product.

and as precise as those generally involved either in the law of tortious misrepresentation (*e.g.*, the distinction between permitted representations of opinion and actionable representations of fact) or in the law of unfair trade practices (see, *e.g.*, *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 232 (C.A. 7), reversed, 348 U.S. 940). But the Commission's power also rests on a broader ground than this.

No order can ever be completely precise. Depending on the nature of the prohibited transaction, every order will leave a broader or narrower borderline area where its applicability will be uncertain. An administrative agency should make its order as precise as possible to prohibit only what is objectionable and to define as carefully as possible what is permissible. But once the agency has satisfied these requirements, it cannot be compelled to sanction objectionable activities because of the limited ambiguities inherent in any order prohibiting them. Admittedly, there will be a number of cases in which the line is narrow between a representation that experimental proof is being furnished and a mere portrayal of a product's characteristics. There are also many cases which fall plainly on one side or the other of that line.[1] In this situation, even the existence of a comparatively broad borderline area is no justification for failing to prohibit plain violations of the statute.

[1] To take only one example, there is little question in cases where the sponsor has stated expressly that a televised test is providing proof of his claims.

There are other, far less drastic, remedies for whatever uncertainty is inherent in any order prohibiting a particular class of violations of the statute. In the present case respondents need not act at their peril in regard to those matters as to which the application of the order is not completely certain. The Commission is obliged to give the respondent definitive advice, in advance, as to whether proposed conduct would meet the requirements of the order.[8] See,

[8] The Commission's revised Rules of Practice for Adjudicative Proceedings (28 Fed. Reg. 7080, 7091 (July 11, 1963)), which apply to this order, provide:

"SEC. 3.26(b) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order.

"(c) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

Foremost Dairies, Inc., 3 CCH Trade Reg. Rep. ¶16435, 21303, 21306 (F.T.C. 1963). As Judge Friendly pointed out in *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (C.A. 2):

> The difficulties respondent foresees in determining whether it is complying with the order seems factitious. The order contains the usual provision for the filing of a report of compliance, 16 C.F.R. § 3.26, and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. § 21(*l*). If at some future time respondent should desire to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion * * *.

Finally, if even those protections are less than 100 percent effective in eliminating all uncertainty in the borderline area between what is permitted and what is forbidden by the order, respondents still need not subject themselves to civil penalties. They can avoid the borderline area altogether simply by avoiding any suggestion that they are furnishing experimental proof of their claims when they are not. As Judge Prettyman said, in dealing with a similar challenge to another Commission order, the order becomes uncertain "only when one attempts to come as close to the line of misrepresentation as the Commission will permit." *Edward P. Paul & Company* v. *Federal Trade Commission*, 169 F. 2d 294,

296 (C.A.D.C.). "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340. See also, *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419, 431 ("those caught violating the Act must expect some fencing in").

CONCLUSION

The Commission acted well within its statutory authority in prohibiting the practice of presenting rigged or sham tests, experiments, or other such demonstrations that are represented as actual proof of a product claim. The judgment of the court of appeals should, therefore, be reversed and the case remanded to that court for entry of judgment affirming and enforcing the Commission's order.

Respectfully submitted.

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SEPTEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964